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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Protest Alleging Awardee's Bid Was Nonresponsive]

FILE: B-197935

DATE: July 18, 1980

MATTER OF: Devcon Systems Corporation *DLG0494*

DIGEST:

Neither pertinent statute nor solicitation clause implementing statute indicates that failure to submit small business subcontracting plan will result in rejection of bid as nonresponsive. Article and statute only require bidder selected for award to submit plan. Therefore, matter relates to responsibility, not responsiveness, despite other solicitation statement that plan must be submitted with bid.

Devcon Systems Corporation (Devcon) protests any award to the Ansul Company (Ansul), under invitation for bid Nos. LGM-9-7558B1 and 7558/1 issued by the Department of Transportation, Federal Aviation Administration (DOT). The solicitation was for the design, delivery, and installation of a fire protection system at 20 air route traffic control centers. No award has been made.

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We find that the protest has no merit.

Article XII, "Small Business and Small Disadvantaged Business Subcontracting Plan (Advertised)," was incorporated into the solicitation by amendment No. 3 which explicitly provided that the plan required by Article XII "MUST be submitted with the bid." Seven bids were received. Ansul was the low bidder and Devcon second low. Although Ansul acknowledged amendment No. 3, the bid did not include a small business subcontracting plan. The president of Devcon immediately advised the agency representative that Ansul's bid was nonresponsive for failure to include a small business subcontracting plan. Devcon then protested Ansul's bid as being nonresponsive to the requirements of amendment No. 3 to our Office. Subsequently, Ansul submitted a small business subcontracting plan to the contracting agency. DOT

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informs us that this plan was considered acceptable and that Ansul has been determined to be a responsible bidder.

Devcon contends that amendment No. 3 identified bid opening as the time limit prescribed by the contracting agency for bidders to submit a small business subcontracting plan and that Ansul's failure to submit a plan by bid opening rendered Ansul's bid ineligible for award under the terms of Article XII. In this regard, Devcon refers to subsection (c) of Article XII, which states:

"(c) The bidder understands that:

* * * * *

(2) If it does not submit a subcontracting plan within the time limits prescribed by the contracting agency, it will be ineligible to be awarded the contract."

Since amendment No. 3 emphasized that bidders had to submit a small business subcontracting plan with their bids, Devcon argues that Ansul's failure to do so constituted a failure to comply with the requirements of the solicitation, thereby making Ansul's bid nonresponsive.

Devcon also asserts that the legislative history of P.L. 95-507, October 24, 1978, 92 Stat. 1757, which, in part, required the submission of subcontracting plans, demonstrates that Federal agencies were to determine from bids whether the bidder intended to meet the requirement for having a small business subcontracting plan. Devcon points out that Article XII implements the act. Devcon refers to 1978 U.S. Code Cong. & Ad. News p. 3872, which states that the purpose of establishing criteria at the outset of each formally advertised procurement is to insure that each bidder knows what subcontracting goals must be met if the bidder wishes to compete for the contract.

DOT takes the position that the submission of a small business subcontracting plan is a matter of responsibility, rather than responsiveness. DOT avers

that neither the act nor Article XII specifies that submission of a small business subcontracting plan is a matter of responsiveness because only a bidder selected for award need submit a plan and such bidder can be determined only after opening. Moreover, the implementation of the plan relates to responsibility. In support, DOT refers to the following provisions of the act and Article XII.

Section 211(5)(A)(iv) of the act provides that in every advertised procurement exceeding a given value the solicitation "shall contain a clause requiring any bidder who is selected to be awarded a contract to submit to the Federal agency concerned a subcontracting plan * * *." Paragraph (5)(B) of section 211 states in part:

"If, within the time limit prescribed in regulations of the Federal agency concerned, the bidder selected to be awarded the contract fails to submit the subcontracting plan required by this paragraph, such bidder shall become ineligible to be awarded the contract. * * *" (Emphasis added.)

Article XII of the solicitation provides:

"(a) The offeror represents that it is aware:

"(1) Of the subcontracting plan requirement in this provision and, if selected for award, it will submit within the time specified by the contracting officer, a subcontracting plan that will afford the maximum practicable opportunity to participate in the performance of the contract to small and small disadvantaged business concerns
* * *

* * * * *

"(b) If the contracting officer believes that the subcontracting plan submitted pursuant to this Section does not reflect the best effort by the bidder to

award subcontracts to small and small disadvantaged firms to the fullest extent consistent with the efficient performance of the contract, he shall notify the agency's director of the Office of Small and Disadvantaged Utilization who shall in turn notify the Small Business Administration and request a review of the plan pursuant to section 8(d)(10)(11) of the Small Business Act. Such request for an SBA review shall not delay award of the contract. * * *

"(c) The bidder understands that:

* * * * *

"(3) Prior compliance of the bidder with other such subcontracting plans under previous contracts will be considered by the contracting officer in determining the responsibility of the offeror for award of the contract."
(Emphasis added.)

DOT further notes that on October 29, 1979, the Office of Federal Procurement Policy requested comments on proposed changes to supplement the Federal Procurement Regulations (FPR) and the Defense Acquisition Regulation already implementing section 211 of the act. See 44 Fed. Reg. 62093 (1979). This proposed guidance was the basis for DOT's Article XII. Final Office of Federal Procurement Policy regulatory guidance superseding in its entirety previous regulatory guidance was issued by policy letter 80-2 on April 29, 1980, with an effective date of June 1, 1980. See 45 Fed. Reg. 31028 (1980). Policy letter 80-2 states that the FPR shall be amended to conform with the regulatory policy contained in that letter. DOT states that this final regulatory guidance has not materially changed the wording of Article XII.

Ansul asserts that the mere fact that amendment No. 3 called for the small business subcontracting plan to be submitted with the bid did not convert a

clear responsibility requirement into a matter of responsiveness. Ansul cites our prior decisions wherein we held that even in cases where bidders were warned that failure to conform to a request for information may result in a rejection of their bids, the information, if called for to determine the responsibility of the bidder rather than the responsiveness of the bid, may be changed or provided subsequent to bid opening without prejudice to the contracting agency's consideration of the bid. See 39 Comp. Gen. 655, 658 (1960); id. 881, 883 (1960); 41 id. 106, 108 (1961).

As to the legislative history of the act, Ansul claims that Devcon has cited passages that refer to the contracting agency's setting of subcontracting criteria at the time the solicitation is issued and that the cited passages do not refer to the submission of the actual plans. Rather, Ansul contends that the legislative history of the act is clear that the contracting agency is without authority to require bidders to submit small business subcontracting plans with their bids. In support of this contention, Ansul points out that the Conference Report on the legislation states that under the Senate bill, only the low bidder on a formally advertised procurement is required to submit a subcontracting plan. The Conference Report then notes that the conference adopted the Senate provision for formally advertised procurements. House Conference Report No. 95-1714, 95th Cong., 2nd sess. (1978). Thus, Ansul emphasizes that the Congress rejected the House bill which required all bidders on formally advertised procurements to submit summary plans for small business subcontracting.

There is a definite distinction between matters related to bid responsiveness and those concerned with bidder responsibility. "Responsibility" as used in Federal procurement refers to a bidder's ability or capacity to perform all of the contract requirements within the limitations prescribed in the solicitation. "Responsiveness" concerns whether a bidder has unequivocally offered to provide the product in total conformance with the material terms and specifications of the solicitation. See J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322. The determination of responsiveness must be made from the bid documents as

of the time of bid opening. Werner-Herbison-Padgett, B-195956, January 23, 1980, 80-1 CPD 66. Requirements bearing on the responsibility of a bidder may be met after bid opening. Starline, Incorporated, B-184683, June 10, 1976, 76-1 CPD 365.

We find nothing in the act or Article XII which indicates that failure to comply with its terms will result in a rejection of a bid as nonresponsive. Devcon has cited several of our decisions involving affirmative action programs which explicitly hold that a bidder's failure to commit itself prior to bid opening to the minimum affirmative action requirements of the solicitation requires rejection of the bid. See Armor Elevator Company, Inc., B-190193, December 12, 1977, 77-2 CPD 457; Regional Construction Company, Inc., B-189073, October 7, 1977, 77-2 CPD 277. However, the decisions cited by Devcon involved solicitations issued under regulatory provisions which specifically required that bidders include particular individual goals as affirmative action commitments. Here, neither the act nor Article XII required bidders to be locked into a small business subcontracting plan at the time of bid submission. Rather, only the bidder selected by the Federal procuring agency for award of the particular contract was required to submit a small business subcontracting plan. Even then, under Article XII, award could be made despite the fact that the submitted plan is deficient. Although amendment No. 3 explicitly stated that bidders had to submit small business subcontracting plans with their bids, bidders were not required to identify or to commit themselves to particular small businesses or small disadvantaged businesses. Cf. Donald W. Close Co. and others, B-192696, B-194037, B-194103, February 27, 1979, 79-1 CPD 134. A matter relating to bidder responsibility cannot be treated as one of responsiveness merely because of a statement to that effect in the solicitation. See Thermal Control, Inc., B-190906, March 30, 1978, 78-1 CPD 252. Also, Ansul acknowledged the amendment and thereby was bound to comply with the requirements of Article XII.

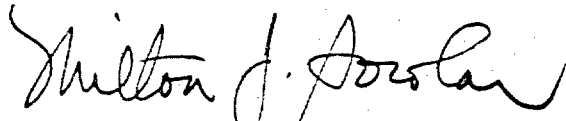
DOT asserts that our decision in 39 Comp. Gen. 247 (1959) is on its facts very close to those here. We agree. In that case, the solicitation contained

advice that bidders furnish with bids certain information concerning subcontractors; however, the solicitation also contained a provision which required the same information to be submitted after award at the request of the contracting officer. We stated:

"Where designated information is by the terms of the invitation required to be submitted with the bid, the inference arises that such information is regarded by the Government as material so that the failure to accompany the bid with such information requires that the bid be rejected. To that extent, the language of the invitation may be regarded as somewhat misleading. On the other hand, we believe that invitations, like contracts, should be so interpreted as to give meaning to each part. As indicated above, to give the provision in question the meaning you urge would render paragraph GC-6 meaningless. For that reason and since such interpretation would be inconsistent with cited regulatory provisions, we do not feel justified in disturbing the award as made. * * *"
39 Comp. Gen. supra, 249-250.

Similarly, to give the language of amendment No. 3 requiring the submission of a small business plan with the bid the interpretation advanced by Devcon would, in our opinion, unreasonably render Article XII meaningless as well as be inconsistent with the clear language of the act. In our view, the solicitation reasonably conveyed the "responsibility" nature of the plan. See Starline, Incorporated, supra.

The protest is denied.



For the Comptroller General
of the United States